Supreme Court, U.S.
FILED
AUG 2 2 2003
OFFICE OF THE CLERK

(7)

Case No. 02-1848

In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition for Writ Of Certiorari To
The U.S. Court of Appeals for the Eighth Circuit

Motion for Leave to File Amicus Curiae Brief and Brief Amicus Curiae of The Honorable Steve Chabot, Chair Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives

VIRGINIA S. ALBRECHT
HUNTON & WILLIAMS
1900 K STREET, NW
WASHINGTON, DC 20006
(202) 955-1943
Attorney of Record

11 pp

MOTION OF THE HONORABLE STEVE CHABOT, CHAIRMAN OF THE SUBCOMMITTEE ON THE CONSTITUTION OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AS AMICUS CURIAE IN SUPPORT OF APPELLANT FRANK KOTTSCHADE

The Honorable Steve Chabot is Chairman of the House Subcommittee on the Constitution of the House Committee on the Judiciary. The Subcommittee's oversight jurisdiction includes constitutionally protected private property rights. It is with an appreciation of the gravity of this action that Chairman Chabot submits this motion to file an amicus curiae brief to respectfully urge the Court to grant the Petition in this matter.

The Subcommittee has considered proposed legislation in the past to deal precisely with the jurisdictional obstacles that prevent property owners such as Franklin Kottschade from accessing the federal courts. Filing a brief now would be timely, as the Court has ordered the City of Rochester to respond to the Petition by August 25, 2003, and the Petition is presently scheduled for conference on September 29, 2003. Representative Chabot was busy with legislative activity and floor votes prior to the August recess. The parties have filed blanket letters of consent with the Clerk of this Court that would permit the filing of this amicus brief by Representative Chabot.

TABLE OF CONTENTS

MOTION TO FILE AMICUS BRIEF i

SUMMARY OF ARGUMENT 1

REASONS FOR GRANTING WRIT 1

THIS COURT SHOULD GRANT CERTIORARI TO RECONCILE ITS CONFLICTING DECISIONS REGARDING WHETHER TAKINGS CLAIMS CAN BE DECIDED BY FEDERAL COURTS, AND TO GIVE CONGRESS GREATER GUIDANCE REGARDING HOW TO MOST EFFECTIVELY ENFORCE CONSTITUTIONAL PROTECTIONS OF PRIVATE PROPERTY RIGHTS 1

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 1, 4-5

Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988) 6

Williamson County Regional Plan. Comm'n v. Hamilton Bank of Johnson City, 522 U.S. 156 (1985) 1, 4-5

Other

H.R. Rep. No. 106-518 ..... 1, 4-6

John Delaney and Duane Desiderio, Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Door of the Federal Courthouse, 31 Urb. Law. 195 (1999) 2

Gregory Overstreet, The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions, 10 J. Land Use & Envt'l L. 91 (1994)) 1

Summary of Argument[1]

This Court should review its Takings Clause jurisprudence in this action in order to reconcile its conflicting decisions in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997).

Reasons for Granting Writ

This Court Should Grant Certiorari to Reconcile its Conflicting Decisions Regarding Whether Takings Claims can be Decided by Federal Courts, and Give Congress Greater Guidance Regarding How to Most Effectively Enforce Constitutional Protections of Private Property Rights.

In *Williamson County*, this Court wrote: "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." 473 U.S. at 195. That holding has caused a crisis in procedural takings law in which federal judges have avoided addressing the merits of federal takings claims in over 94% of all takings cases litigated between 1983 and 1988,[2] and in which 83%

---

[1] Pursuant to Rule 37.6 of the Court, counsel for the amicus discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no person or entities other than the amicus or his counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See* H.R. REP. NO. 106-518, at 10 (citing Gregory Overstreet, The Ripeness Doctrine of the Takings Clause: A Survey of

of the takings claims initially raised in the federal district courts from 1990 to 1998 never reached the merits.[3] Of those property owners who could afford to appeal their cases through the state courts in order to have their case heard in federal court, more than 64% still failed to have their appeals heard on the merits. Moreover, it has been noted that of the small portion of appellate cases where takings claims were found procedurally ripe and the merits reached, "it took property owners, on the average, 9.6 years to have an appellate court reach its determination."[4] Even these shocking statistical profiles of denials of justice cannot reveal the numbers of additional low income or middle class property owners, who – in the face of the extremely expensive and purely procedural challenges that now stand between them and a Federal forum on the merits of their Federal civil rights claims – are too intimidated to even start down the long road to a hearing on the merits of their case in federal court.

During the 106th Congress, Chairman Chabot's predecessor as Chairman of the House Subcommittee on the Constitution, Charles Canady, was the lead sponsor of H.R. 2372,[5] the "Private Property Rights Implementation

---

Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions, 10 J. Land Use & Envt'l L. 91, 92 n. 3 (1994)).

[3] *See ibid.* (citing John Delaney and Duane Desiderio, Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse, 31 Urb.Law. at 202-231 (1999), at 196).

[4] *Ibid.*

[5] 106th Cong. (2d. Sess. 2000).

Act of 2000." Among other things, H.R. 2372 was designed to address the systematic suppression of individuals' defenses to property rights violations by clarifying and simplifying the procedures governing federal property rights claims in federal court, and by clarifying when a "final decision" has been made by a local government regarding the permissible use of private property. Moreover, H.R.2372 would have removed the requirement that property owners litigate their federal takings claims in state court first, and provided property owners like Petitioner Franklin Kottschade a meaningful opportunity to have the federal courts decide his case. On March 16, 2000, H.R. 2372 passed the House of Representatives by a vote of 226-182, with Chairman Chabot's support. Clarifying this Court's Takings Clause jurisprudence to determine whether constitutional takings claimants can have their claims decided by federal courts will greatly facilitate Congress's ability to take actions to effectively protect private property rights.

While the burdensome procedural difficulties faced by private property owners seeking to assert their constitutionally protected private property rights are clear, the state of this Court's Takings Clause jurisprudence is not. That is because after this Court decided *Williamson County*, it held in *City of Chicago* that when constitutionally aggrieved landowners properly file their takings actions in state courts, municipal defendants can routinely remove those cases to federal court. That decision relied on 28 U.S.C. § 1441(a), which permits removal of state court actions to federal courts only where the *plaintiff* could have initially filed the action in federal court. Therefore, if this Court was of the view that an exhaustion of state remedies is constitutionally required before a plaintiff can bring a federal takings claim in

federal court, this Court could not have ruled as it did in *City of Chicago*: if a municipality can remove federal (and supplemental state) claims to federal court, then necessarily takings plaintiffs *can* bring their claims in federal court from the start.

One question of great concern to Congress, and to Chairman Chabot by virtue of his oversight responsibilities regarding the protection of private property rights, is, "Does this Court's decision in *City of Chicago* allow plaintiffs to bring their federal takings claims in federal court initially?" If so, Congress may not have to pursue federal legislative solutions, such as H.R. 2372, to the current crisis in which burdensome procedural obstacles prevent private property owners from asserting their federal, constitutionally protected property rights claims in federal court.

The House Judiciary Committee, in its Report on H.R. 2372, contains several statements that support the need for this Court to review its Takings Clause jurisprudence in order to reconcile conflicting reasoning underlying this Court's decision in *Williamson County* and in *City of Chicago*. As stated in the Committee Report on H.R. 2372:

> In *City of Chicago v. International College of Surgeons*, the Supreme Court concluded, "a case containing claims that local administrative action violates Federal law ... is within the jurisdiction of Federal district courts." 522 U.S. 156, at 528-29. Indeed, on remand, the seventh circuit had no difficulty finding that it could appropriately resolve the merits of the takings claim without State court review. The seventh circuit recognized that "the doctrine of abstention is 'an extraordinary remedy

and narrow exception to the duty of a District Court to adjudicate a controversy properly before it' and may be invoked only in those 'exceptional circumstances' in which [a] surrendering jurisdiction 'would clearly serve an important countervailing interest.' *City of Chicago v. International College of Surgeons*, 153 F.3d 356, 360 (7th Cir. 1998). While the ordinance at issue "reflect[ed] important local policy concerns regarding the development and preservation of ... real estate," *id.* at 362, the seventh circuit easily found that the matter before it could be decided on the merits. Thus, the *City of Chicago* decision on remand confirms H.R. 2372's fundamental proposition that Federal courts have an obligation to hear Federal takings cases premised on the conduct of local officials ... Some have argued that because the Supreme Court, in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), discussed takings ripeness requirements in the context of the fifth amendment's reference to "just compensation," takings ripeness requirements are "constitutional" in nature, and beyond the authority of Congress to regulate, rather than purely prudential. However, in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the Supreme Court held that when constitutionally aggrieved landowners properly file their takings actions in State courts, the municipal defendants can routinely remove those cases to Federal court. The decision relied on 28 U.S.C. Sec. 1441(a), which permits removal of State court actions to Federal courts only where the plaintiff could have initially filed the action in Federal court. In that case, the

> aggrieved property owner could not have filed its action in the Federal courts under the reasoning of Williamson County, if that reasoning is understood to declare takings ripeness requirements "constitutional" in nature, and also the seventh circuit's opinion in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988) ("[T]he suit for just compensation is not ripe until it is apparent that the State does not intend to pay compensation."). Yet the Supreme Court ruled as it did. Claims that ripeness requirements are somehow "constitutional" in nature, rather than prudential, cannot withstand the holding in *College of Surgeons*.[6]

If this Court agreed to take Petitioner's case, it could do much to alleviate the confusion of many regarding the state of procedural takings law and, consequently, clarify Congress's potential role in protecting private property rights.

Conclusion

This Court should grant Petitioner's requested writ of certiorari and reconcile conflicting legal reasoning underlying its Takings Clause jurisprudence in order to facilitate Congress's ability to effectively enforce constitutionally protected property rights.

---

[6] H.R. REP. NO. 106-518, at 19 n.7, 20-21.

DATED: August 22, 2003

Respectfully submitted,

VIRGINIA S. ALBRECHT
HUNTON & WILLIAMS
1900 K STREET, NW
WASHINGTON, DC 20006
(202) 955-1943

Attorney of Record for *Amicus Curiae*
The Honorable Steve Chabot,
Chair, Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives